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No. 73-631

Supreme Court of the United States

October Term, 1973

HOWARD JOHNSON CO., INC.,

Petitioner,

v.

DETROIT LOCAL JOINT EXECUTIVE BOARD, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, AFL-CIO,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE A REPLY TO THE SUPPLEMENTAL BRIEF FOR PETITIONER AND RESPONDENT'S REPLY TO THE SUPPLEMENTAL BRIEF FOR PETITIONER

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Detroit Local Joint Executive Board, the respondent in this case, pursuant to Rule 41(5) & (6) of the Rules of this Court, hereby moves for leave to file the accompanying reply to the supplemental brief for petitioner. In support of this motion the Union shows as follows:

When the decision in *United Steelworkers* v. *United States Gypsum Co.*, —— F.2d ——, 85 LRRM 2962 (C.A. 5, April 11, 1974) (hereafter "*Gypsum*") appeared, we considered filing a supplemental brief calling that case to this Court's attention. However, we forbore to do so, because we had already filed a supplemental brief with re-

spect to the decision in *Teamsters Local 249* v. *Bill's Trucking, Inc.*, —— F.2d ——, 85 LRRM 2713 (C.A. 3, March 13, 1974) (hereafter "*BTI*"). However, given the filing of Howard Johnson's supplemental brief discussing *Gypsum*, a reply is called for.

CONCLUSION

For the above-stated reasons this motion for leave to file a reply to the supplemental brief for petitioner should be granted.

Respectfully submitted,

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RESPONDENT'S REPLY TO THE SUPPLEMENTAL BRIEF FOR PETITIONER

1. The central issue in this case is whether, as Howard Johnson insists, this Court's decision in *NLRB* v. *Burns Security Services,* 406 U.S. 272 (hereafter *"Burns"*), entirely eliminated the obligation of a successor to adhere to the arbitration clause in his predecessor's collective bargaining agreement, as declared in *John Wiley & Sons* v. *Livingston,* 376 U.S. 543 (hereafter *"Wiley"*), or whether, as we submit, *Burns* only approved the pre-*Wiley* holdings that the National Labor Relations Board is without power to impose an obligation on the successor to honor the entire contract.

In considering that question the *Gypsum* decision (H.J. Supp. Br. p. 3, 7-9) is instructive in two respects:

First, and most obviously, it shows that the Fifth Circuit, like the Sixth in this case and the Third in *BTI* (H.J. Supp. Br. pp. 3-6), understood *Burns* as delineating only the Board's powers and not those of the courts or the arbitrators. (85 LRRM at 2967-2973.)

Second, *Gypsum*, demonstrates that arbitrators can fulfill the role envisaged for them in *Wiley* in a principled fashion which permits meaningful review by the courts (85 LRRM at 2965-2967, 2973-2978), and thereby confirms this Court's expression of confidence in *Wiley* "that within the flexible procedures of arbitration a solution can be reached which would avoid disturbing labor relations in the [successor's] plant," (376 U.S. at 551-552, n. 5). Indeed, that observation was made in rejecting the same objection which U.S. Gypsum raised (84 LRRM at 2965), and which Howard Johnson maintains here (H.J. Supp. Br. pp. 6-9)—that enforcement pursuant to § 301 of the arbitration provision of a predecessor's contract against his successor would be inconsistent with the representation provisions of the National Labor Relations Act. The answer was and remains *Retail Clerks* v. *Lion Dry Goods*, 369 U.S. 17, cited in *Wiley*, 376 U.S. at 551-552, n. 5). (See the discussion at pp. 28-29 of our main brief.) Thus, the resulting "dichotomy" to which the Company objects (H.J. Supp. Br. p. 9) inheres in the statutory scheme, see pp. 33-34, n. 15 of our main brief and pp. 3-10 of the brief *amicus curiae* of the AFL-CIO, citing *inter alia*, *NLRB* v. *C & C Plywood*, 385 U.S. 431 and *NLRB* v. *Strong*, 393 U.S. 357, to which the Company has never made any response. To those precedents we can now add *William E. Arnold Co.* v. *Carpenters*, —— U.S. ——, 42 U.S.L.Wk. 4754 (May 20, 1974). In *Arnold*, as in *C & C Plywood*, 385 U.S. at 427-428, this Court em-

phasized "the congressional purpose that § 301 suits in state and federal courts should be the primary means for 'promoting collective bargaining that [ends] with agreements not to strike,' " (Sl. Op. p. 6, & see *id.* at p. 4). Yet Howard Johnson would have it that the limitations on the Board's authority to enforce contracts recognized in *Burns* are also controlling in the "primary" forum for vindicating arbitration agreements—the courts.[1]

2. The other issue which Howard Johnson has raised in this case is whether, since the company refused to hire most of its predecessor's employees, it is a successor. Admittedly (H.J. Supp. Br., p. 8), that issue was not involved in *Gypsum*. It was, however, decided in *BTI*, and adversely to Howard Johnson's position here. (85 LRRM at 2713-2714, 2717-2718.) Howard Johnson would have it that the ruling of the Third Circuit that BTI would be a successor even though it chose to hire none of ETI's employees was *dictum*: "The Court of Appeals concluded that, based on the union's complaint, the employer involved 'was in reality the same corporation with which the union had a contract' [citing 85 LRRM at 2718], and that the employer dismissed its employees either on the day the transfer of stock took place or the next day." (H.J. Supp. Br., p. 3, footnote

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[1] The Company cites (H.J. Supp. Br., p. 9) an article by Dean St. Antoine which was quoted in *Gypsum*. With due respect to this author, his article can afford little guidance in the present case. Because the thrust of Dean St. Antoine's article was that *Burns* was wrongly decided given *Wiley*, he did not analyze the question presented in this case in the terms in which it is necessarily before this Court—that *Burns* was correctly decided, but that its holding fairly read does not govern in the § 301 context, which, indeed, was carefully distinguished from the § 8(d) context in which *Burns* arose, (see 406 U.S. at 285-286).

omitted.) But, Howard Johnson's quotation stops before the Third Circuit's recital of the union's alternative allegation, "that BTI at least represented a 'substantial continuity' of business enterprise from ETI to BTI," (85 LRRM at 2718). *BTI* thus follows the *Wiley* test of successorship—whether there is a "lack of any substantial continuity of identity in the business enterprise before and after [the ownership] change" (376 U.S. at 551)—and remands to the District Court to afford the union an opportunity to prove its case under that test (85 LRRM at 2718).

On the merits of the successorship issue Howard Johnson once again asserts that in the "exercis[e of] its right to determine its work force, [it] hired none of the former owner's employees in one of the bargaining units involved and a minority of the employees in the other bargaining unit, [and that therefore] it should not be found to be a successor." (H.J. Supp. Br., p. 8.) The Company has never identified the source of this claimed "right," be it the contract, a statute, or some brooding omnipresence in the sky. The only employer "prerogative" which this Court has recognized is that of "owners independently to rearrange their business and even eliminate themselves as employers"; and in light of "the objectives of national labor policy" this Court has also recognized that *that* prerogative must "be balanced by some protection to the employees from a sudden change in the employment relationship," (*Wiley*, 376 U.S. at 549). Yet, the Company would pyramid its acknowledged prerogative into a right to destroy the employees' legitimate expectations under a collective bargaining agreement, including the basic right thereunder to retain a job except when discharged for just cause. Indeed, Howard Johnson's theory of the *Wiley* successorship doc-

trine would provide an affirmative incentive to an employer who takes over another's business to rid himself of all or at least a majority of his predecessor's employees. The unanimous decision of this Court in *Wiley* is not to be thus turned against itself.[2]

[2] In the main, rather than deal with the aspects of *BTI* and *Gypsum* that parallel this case, Howard Johnson dwells on the differences since those cases required the resolution of difficulties not present here: In *BTI* the absence of an arbitration provision which meant that the District Court was required to determine the extent to which the substantive provisions of the contract survive (H.J. Supp. Br. pp. 4-6); and in *Gypsum* the decertification of the union in an NLRB election in which the predecessor's employees (who had been retained) voted (H.J. Supp. Br. pp. 6-7, 9). But in this case there is an arbitration clause and there is no evidence that the employees of Grissoms (Howard Johnson's predecessor) were in any way dissatisfied with the Union. Thus those portions of Howard Johnson's argument merely indicate that *BTI* and *Gypsum* are harder cases from the union standpoint than the instant case.

Respectfully submitted,

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